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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 125

ESTATE OF DANIEL GUGGENHEIM, DECEASED, FLORENCE GUGGENHEIM, EXECUTRIX, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 91–137) is reported at 39 B. T. A. 251. A supplemental opinion of the Board (R. 151–155) is reported at 40 B. T. A. 181. The opinion of the Circuit Court of Appeals (R. 238–249) is reported at 117 F. (2d) 469.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 6, 1941 (R. 254–255). Petition

for a writ of certiorari was filed June 5, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the entire value at decedent-settlor's death of the trust which he established is includible in his gross estate, under Section 302 (d) of the Revenue Act of 1926.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke. * * *
>
> * * * * *
>
> (h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests,

rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C., Title 26, Sec. 411.)

Treasury Regulations 70 (1929 Ed.):[1]

ART. 15. *Transfers during life.*— * * * If the enjoyment of the property or the interest transferred * * * was subject at the date of the decedent's death to change by the exercise of any power to alter, amend, or revoke, * * * the entire value of the property, or the interest transferred, as of the date of decedent's death must be included in the gross estate * * *.

* * * * *

ART. 19. *Power to change enjoyment.*—The value of property transferred, other than by a bona fide sale for an adequate and full consideration in money or money's worth, constitutes a part of the gross estate if at the time of the decedent's death the enjoyment thereof was subject to any change through a power, exercisable either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.

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[1] The 1929 edition of Regulations 70 were in effect at the date of the decedent's death. These regulations were thereafter superseded by Regulations 80, the corresponding provisions of which appear in Articles 15 and 20.

STATEMENT

The facts with respect to the only issue presented by the petition were stipulated (R. 183–186, 187–238), and may be summarized as follows:

The decedent, Daniel Guggenheim, died September 28, 1930 (R. 123, 183). On October 29, 1917, the decedent created a revocable trust for the benefit of his son, Meyer Robert Guggenheim (hereinafter referred to as Robert), and of Robert's children and descendants (R. 134–135, Ex. 7, R. 187–198). On May 28, 1918, an amended trust agreement was executed, but was also dated October 17, 1917 (R. 185; Ex. 8, R. 198–211). As thus amended, the trust provided for the annual payment of $21,000 of trust income to decedent's son, Robert, therein called the beneficiary, for a period of ten years from October 29, 1917, or until the earlier termination of the trust (R. 200). At the end of ten years, or at the time of any earlier termination, the trustees were to pay the corpus and any accumulations to Robert free of all restrictions (R. 202). In case of Robert's death before termination of the trust, the trust was to continue for twenty years after Robert's death, during which time the child or children of Robert (restricted by definition to children of his first and second marriages) were to receive the income for their maintenance and education until reaching twenty-one, and the income outright after they became twenty-one years of age and until twenty

years after Robert's death, at which time the children were to receive the corpus, including accumulations of income thereon, in equal shares. There were remainders over for the descendants of children dying within the twenty-year period (R. 123–126, 202–204). The settlor reserved to himself a power to modify, alter or revoke the trust (R. 125–126, 207).

On February 14, 1922, the decedent amended the trust in certain respects (R. 126–129; Ex. 9, R. 211–221). He directed that Robert be paid an annual income of $21,000 for life instead of ten years, but reserved the right to direct the trustee to pay Robert more or even all of the trust income or to direct the reduction of Robert's allowance to nothing at all (R. 127, 213–214). All trust income not paid out was to accumulate and become part of the corpus, subject to a reserved right on the part of the settlor to direct payment of any part of such accumulations to any beneficiary (R. 127, 214–215). The trust was to continue for twenty years after Robert's death, during which time the child or children of Robert (restricted again by definition to children of his first and second marriages) were to receive income for their education and maintenance. At the end of the twenty-year period, the trust was to terminate and all funds were to be divided among such children in equal shares; or if any child were then dead, its share was to go to its testamentary appointees or intestate

heirs (R. 215–216). If a child predeceased Robert the share, both of income and principal, which would have vested in the child at Robert's death, was to vest in the child's descendants, *per stirpes,* and all payments were to be made to such descendants under the same conditions as to age, lapse of time and otherwise, as if such payments were to be made to the descendant's ancestor. No descendant could be a beneficiary at any time, however, unless his ancestor, the child of Robert, had died. If neither child nor descendants of children survived Robert, the property was to revert to decedent-settlor or his estate (R. 217). By the same instrument the settlor then conferred upon the three uncles of Robert (the settlor's three brothers) certain powers of management of the trust, including the power to increase the income payable to Robert or to decrease the income, even down to no income at all (R. 128, 218–219). In addition, decedent changed the reserve powers to revoke the trust or to alter the limitations to read as follows (Ex. 9, R. 220–221):

III

> The Settlor hereby relinquishes, abandons and divests himself of all powers by the said trust agreement of the 29th day of October, 1917, reserved to or retained by him to revoke the said trust agreement and the trust existing thereunder, and the said trust agreement shall have effect, and the Trustee shall hold title to the trust fund and

to the properties, interests, and securities comprising the same, and the trust created by the said trust agreement shall be executed and administered as if no power of revocation had ever been reserved to or retained by the Settlor.

IV

Nothing in this instrument contained shall be deemed to affect or limit the power of the Settlor to modify, alter or correct the provisions of the said trust agreement of the 29th day of October, 1917, provided that any such modification, alteration or correction shall not operate to revoke the said agreement or the trust existing thereunder, or to frustrate the essential purposes of the trust of making provisions for the son of the Settlor, and his children or descendants, or to impair the substantial integrity of the trust fund, or to create a beneficial interest in or under the trust, on behalf of the Settlor or any person not previously beneficially interested therein or thereunder. The Trustee shall not be required to pass upon the legal effect of any such modification, alteration or correction made by the Settlor, or to determine whether the same is within the power or authority of the Settlor to make; and by reason of any such modification, alteration or correction made by the Settlor the Trustee shall incur no liability to any person whatsoever. Nor shall anything in this instrument contained be deemed to affect or limit the power of

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> the Settlor, by directions in writing given to the Trustee, to alter, define and prescribe the relative interests of the beneficiaries in the trust fund or the income thereof, their respective shares in the same, their respective powers with respect to such shares, and the time and manner of making distribution to the beneficiaries, or any of them, by way of advancement, postponement or otherwise, of principal or income, or both, of the trust fund; which power of the Settlor is hereby expressly reaffirmed and reserved, together with the power of causing a final distribution to be made at any time to or among the beneficiaries, or any of them, and so terminating the trust.

By a further instrument dated February 4, 1925 (Ex. 10, R. 222–229), the decedent-settlor again exercised the powers reserved to him (Ex. 8, R. 198–211) to modify, alter, or correct the provisions of the trust agreement. Few of those alterations are material here. That instrument, however, again reaffirms (R. 228–229), in language similar to that just set forth, the decedent's reserved power to modify, alter, or correct the provisions of the trust instrument, as amended and modified.

Robert was divorced from his first wife and remarried in 1915. He had two children by his first marriage, Daniel Guggenheim II and M. R. Cordova Guggenheim. The child Daniel died in 1925

without issue (R. 124, 186). In 1928 Robert was divorced from his second wife, by whom he had no children, and he remarried the same year (R. 124, 186). Thus at the time of decedent's death, Robert had only one surviving child of his first and second marriages, Cordova Guggenheim, born August 13, 1910 (R. 123–124, 186).

The Commissioner of Internal Revenue included the entire value of the trust at the date of decedent's death (R. 36) in decedent's gross estate. The total value of the trust at decedent's death was not less than $2,289,450.62 (R. 129, 233–234). The Board of Tax Appeals sustained the Commissioner's determination in respect to this issue (R. 123–136, 151–155); the Circuit Court of Appeals for the Second Circuit affirmed (R. 246–249).

ARGUMENT

1. By the instrument of February 14, 1922 (Ex. 9), the decedent in terms abandoned his reserve power to revoke the trust which he had established (R. 220) and conferred upon his three brothers certain powers of directing and controlling the administration of the trust and the management of the trust fund (R. 218). Those are substantially all the limitations the decedent placed upon his reserved powers. He did not divest himself before his death of all power, by alteration or amendment of the trust instrument, to effect any change in the enjoyment of the trust property.

To the contrary, by the modifying instrument of February 14, 1922 (Ex. 9), and by the further modifying instrument of February 4, 1925 (Ex. 10), the decedent meticulously reserved to himself and to himself alone certain powers of modification and alteration of the trust instrument. These reserved powers are set forth in the instrument of February 4, 1925, in the following words (R. 228–229):

> Nothing in this instrument contained shall be deemed to affect or limit the power of the Settlor to modify, alter or correct the provisions of the said trust agreement made as of the 29th day of October, 1917, as amended and modified, provided that any such modification, alteration or correction shall not operate to revoke the said agreement or the trust existing thereunder, or to frustrate the essential purposes of the trust of making provisions for the son of the Settlor and his children or descendants or to impair the substantial integrity of the trust fund, or to create a beneficial interest in or under the trust, on behalf of the Settlor or any person not previously beneficially interested therein or thereunder. * * * Nor shall anything in this instrument contained be deemed to affect or limit the power of the Settlor, by directions in writing given to the Trustee, to alter, define and prescribe the relative interests of the beneficiaries in the trust fund or the income thereof, their respective shares in the same, their respective

> powers with respect to such shares, and the time and manner of making distribution to the beneficiaries, or any of them, by way of advancement, postponement or otherwise, of principal or income, or both, of the trust fund: which power of the Settlor is hereby expressly reaffirmed and reserved, together with the power of causing a final distribution to be made at any time to or among the beneficiaries, or any of them, and so terminating the trust.

Within the limitations thus imposed the decedent could make alterations in the trust instrument as he chose. The class of beneficiaries was limited at decedent's death to decedent's son Robert and the latter's son Cordova. As between them, however, the decedent could "alter, define and prescribe" their "relative interests * * * in the trust fund or the income thereof, their respective shares in the same, their respective powers with respect to such shares," etc., and could then cause a final distribution to be made and terminate the trust (R. 228–229). It will also be noted that the decedent had another express power, in addition to or overlapping with those just described, to direct and require the trustee to pay "to any beneficiary" *any and all trust income* and "any and all receipts of sums of money or other cash disbursements in the nature of return of capital or distribution of assets" (R. 227). See also stipulation

No. 3 before the Board (R. 150). In such circumstances the decisions are unanimous that the decedent-settlor reserved sufficient powers to himself to bring the corpus of the trust within Section 302 (d) of the Revenue Act of 1926. *Commissioner* v. *Chase Nat. Bank,* 82 F. (2d) 157, 158 (C. C. A. 2d), certiorari denied, 299 U. S. 552; *In re Tyler's Estate,* 109 F. (2d) 421 (C. C. A. 3d); *Holderness* v. *Commissioner,* 86 F. (2d) 137, 138–139 (C. C. A. 4th); *Hoblitzelle* v. *United States,* 3 F. Supp. 331 (C. Cls.). See also *Porter* v. *Commissioner,* 288 U. S. 436; *Chickering* v. *Commissioner,* 118 F. (2d) 254 (C. C. A. 1st); *Witherbee* v. *Commissioner,* 70 F. (2d) 696, 697 (C. C. A. 2d), certiorari denied, 293 U. S. 582; rehearing denied, 293 U. S. 631; *Millard* v. *Maloney* (C. C. A. 3d), decided June 6, 1941, not yet officially reported but found in 1941 Prentice-Hall, Vol. 4, par. 62,739; *Cook* v. *Commissioner,* 66 F. (2d) 995 (C. C. A. 3d); *Dort* v. *Helvering,* 69 F. (2d) 836, 840–841 (App. D. C.). Cf. *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 45, 51–52.

2. Petitioner concedes (Pet. 5, Br. 10), as indeed she must, that under the power to modify the decedent could retake from the three uncles the power to increase or decrease Robert's income,[2] but urges that decedent had no power to reduce the remainder for Robert's benefit. As noted, how-

[2] Hence petitioner admits (Pet. 2, Br. 10) that the value of Robert's life interest should be included in decedent's gross estate.

ever, in the preceding paragraph, decedent reserved the power to direct the payment "to any beneficiary" of any and all trust income and any and all receipts of money or other cash disbursements in the nature of return of capital or distribution of assets (R. 227). Thus decedent might have directed the disbursement to Robert (or to Robert's child) of all the very large profit realized from the sale by the trustee of Kennecott Copper Corporation stock (R. 150), and so likewise the profit on any other sales.[3] By reason of such provision (R. 227) and of the further powers specifically reserved to decedent (R. 221, 228–229) "to alter, define and prescribe the relative interests of the beneficiaries *in the trust fund or the income thereof,* their respective shares in the same," etc., there thus was no substantial remainder interest whatever for Cordova Guggenheim which decedent could not impair and divert to Robert. [Italics supplied.][4]

3. The decision of the court below is not in conflict with its previous decision in *Commissioner* v.

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[3] This is in addition to the $46,500 return of capital on Anglo-French and on Braden Copper Mines Company bonds (R. 230–231), the distribution of which apparently the petitioner concedes (Pet. 6, Br. 11) was subject to decedent's control.

[4] Petitioner assumes (*viz*, Pet. 8, Br. 10) a contrary construction of the trust agreement. Petitioner's construction is at total variance with the construction placed on the instrument by the Board (R. 132–135, 152–155) and by the court below (R. 248–249).

Flanders, 111 F. (2d) 117, or with *Day* v. *Commissioner* 92 F. (2d) 179 (C. C. A. 3d), or *Tait* v. *Safe Deposit & Trust Co. of Baltimore,* 74 F. (2d) 851 (C. C. A. 4th).

The Flanders trust was created in 1910 and was not subject to alteration or change. It was terminable by sale, upon consent of the settlor, but *only* if some emergency or change occurred in the affairs of the corporation whose stock formed the trust corpus which rendered it "advisable" to the trustees, one of whom was a remainderman under the trust, "in the exercise of a sound discretion and judgment" to sell. In that event the proceeds of the sale were payable to the settlor as his absolute property. No such change took place or emergency arose in the affairs of the corporation. The court held the trust corpus not taxable as a part of the settlor's estate, for both or either of two reasons: (1) the settlor's power to consent to a sale of the trust property and termination of the trust, exercisable only in conjunction with the trustees, was a power conditioned upon the exercise by the trustees of a discretion dependent on the existence of an emergency or change in the affairs of the corporation, which condition never happened; and (2) the trustee-brother of the settlor, as a remainderman under the trust, had an interest adverse to any sale, the proceeds of which must be paid to the settlor. Since the trustee had such an adverse interest, the case was thought to be ruled by the prin-

ciple which governed in *Helvering* v. *Helmholz*, 296 U. S. 93, 97–98. Such is not the case here.

Nor is *Day* v. *Commissioner, supra,* in conflict. The settlor there, unlike the decedent-settlor here, had no present power to alter or amend the trust. The power in issue was a contingent power exercisable only upon the assent of the settlor's daughter-beneficiary, "after she shall have attained her majority." The settlor died during the daughter's minority. Likewise in *Tait* v. *Safe Deposit & Trust Co. of Baltimore, supra,* the particular power was not a present power but a contingent power; to exercise it the settlor had to survive his wife. She survived him. The settlor, however, had a noncontingent and absolute power to alter the remainder interest in one-half of the trust, after the estate of his wife. It was therefore conceded and recognized in that case (p. 855) that the power reserved by the grantor to vary the provisions of the deed relative to the disposition of this remainder interest "was sufficient to make the transfer to this extent one in which the enjoyment thereof was subject to change by the grantor at the date of his death within Section 302 (d) of the Revenue Act of 1926." *Tait* v. *Safe Deposit & Trust Co. of Baltimore, supra,* in consequence, sustains and supports the decision of the Second Circuit in this case.

4. The decision below is not in conflict with the principle of this Court's decision in *Porter* v.

Commissioner, 288 U. S. 436, 443. Petitioner's argument to the contrary is premised entirely upon the erroneous assumption that Cordova Guggenheim had a substantial and valuable remainder interest under the trust instrument not subject to alteration or change by the decedent-settlor during his lifetime. That premise is unsound. Here, as in the *Porter* case, the settlor's death "terminated" his control, "ended the possibility of any change by him, and was, in respect of title to the property * * *, the source of valuable assurance passing from the dead to the living." *Porter* v. *Commissioner, supra,* p. 444. Thus, as in the *Porter* case, the value of the corpus of the trust is subject to tax by Section 302 (d), and the court below properly so held.

CONCLUSION

The case was correctly decided by the court below. There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
WARREN F. WATTLES,
Special Assistants to the Attorney General.

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